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In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT S. COOPER, JR., PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A-4 to A-16, A-27 to A-38) are reported at 558 F. 2d 274 and 594 F. 2d 484.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1977, and the decision on rehearing was rendered on May 7, 1979. The petition for a writ of certiorari was filed on August 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an Aircraft Accident Report prepared by the Department of the Navy under pledges of confidentiality solely for the purpose of determining the cause of an accident in order to prevent similar occurrences in the

future is exempt from mandatory disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

2. If the report is exempt from mandatory disclosure, whether the Department of the Navy waived the confidentiality of the Aircraft Accident Report in this case.

STATEMENT

Petitioner, an attorney, brought this suit in the United States District Court for the Middle District of Louisiana under the Freedom of Information Act (FOIA) to obtain reports compiled by the Department of the Navy concerning the crash of a Marine Corps helicopter in 1974. Petitioner had been retained by the family of one of the persons who died in the crash to investigate the prospects of bringing a wrongful death action against the manufacturer of the helicopter (Pet. App. A-7).

In all cases involving a significant accident, the Navy conducts at least two investigations. The primary investigation, which the court of appeals described (Pet. App. A-8) as "in the nature of an inquest," is the Judge Advocate General's Manual Investigation. Its purpose is to assemble a factual documentation of all matters pertaining to the investigation that may serve as a basis for legal or administrative action. Witnesses are required to be warned of their rights against compulsory self-incrimination, and, in more serious accidents, a formal hearing is held (*ibid.*).

The other investigation, the Aircraft Accident Safety Investigation, is, as the court of appeals explained (Pet. App. A-8), "solely concerned with safety and the prevention of accidents." Instructions for conducting these investigations state that witnesses are not to be sworn and are to be assured that their testimony will not

be used in any legal or other punitive proceeding. Witnesses are urged to be concerned about the safety of others, to give their personal opinions, and to speculate about possible causes of the accident in a manner they might be reluctant to assume in the more formal setting of the Judge Advocate General's Manual Investigation. Information obtained in the course of the Aircraft Accident Safety Investigation can then be used to prevent similar accidents involving other craft. See Pet. App. A-8 to A-9, A-10 to A-11.

Petitioner sought both the Judge Advocate General's Manual Investigation Report (JAG Report) and the Aircraft Accident Report (AAR) pertaining to the crash of the Marine Corps helicopter. The Navy furnished to petitioner all factual matters contained in the JAG Report (Pet. App. A-3). The district court concluded that that was "sufficient disclosure" (*ibid.*), and the court of appeals affirmed (*id.* at A-16). Petitioner raises no issue concerning the JAG Report in this Court.

The district court concluded, however, that the AAR prepared in connection with the helicopter crash was exempt from mandatory disclosure under Exemption 5 of FOIA, 5 U.S.C. 552(b)(5), which authorizes the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" (Pet. App. A-3). The court of appeals affirmed, finding "reason in the Navy's arguments that breaching the [AAR's] confidentiality would destroy or greatly diminish a highly effective safety program which has saved numerous lives and much government property" (*id.* at A-15).

Petitioner subsequently filed a petition for rehearing, arguing, among other things, that the AAR in this case had been disclosed to individuals outside the flight safety program (Pet. App. A-17). He attached in this connection a copy of the fourth endorsement to the AAR,[1] which, it was alleged, had been furnished to the defense counsel for Sikorsky Aircraft Corporation (the manufacturer of the helicopter) for use in pending litigation. After a response from the government, the matter was remanded to the district court for a hearing to determine "to whom the * * * report has been disclosed and the legal effect of such disclosures, if any" (*id.* at A-18). The petition for rehearing was held in abeyance pending certification by the district court of the record on remand and its findings and conclusions (*ibid.*).

On remand the matter was considered by the district court on the basis of four depositions taken by the parties. The district court concluded that the AAR had been distributed to people other than those authorized by Navy regulations to see it and that the Navy should be held to have waived any right it might have had under FOIA to withhold the AAR (Pet. App. A-25). The district court then certified the matter to the court of appeals (*id.* at A-26).

On its review of the depositions considered by the district court, the court of appeals found no clear error in the district court's finding that the fourth endorsement to the AAR had been improperly disseminated by Navy

[1]Among the purposes of an endorsement "is to offer each command level an opportunity to state agreement, disagreement or reservations about the document's conclusions as it makes its way up the chain" (Pet. App. A-33).

personnel. The court of appeals therefore agreed that "[t]he Navy's privilege to withhold this endorsement was properly held to have been waived" (Pet. App. A-36).

As to the body of the AAR and its other endorsements, however, the court of appeals found that "[t]here is little or no evidence in this record that the confidentiality of these has been compromised at all, let alone by authority of the Navy" (Pet. App. A-37). The court stressed that the form of the fourth endorsement "is that of a separate message" (*ibid.*) and therefore rejected the "district court's conclusions that possession of [the fourth endorsement] indicates possession of the entire AAR" (*ibid.*). The court pointed out that only "conjecture and suspicion" supported the district court's finding that the confidentiality of the AAR and other endorsements had been breached and thus that the finding was "clearly erroneous" (*ibid.*). Because the confidentiality of the AAR and its other endorsements had not been waived, the court of appeals concluded that they need not be released to petitioner under FOIA (*id.* at A-37 to A-38).

ARGUMENT

1. The court of appeals was clearly correct in concluding that confidentiality of witness' statements on which the AAR is based, is essential to the effectiveness of the Aircraft Accident Safety Investigation program and that, in these circumstances, the AAR is exempt from mandatory disclosure under Exemption 5 of the FOIA. Although the AAR does contain factual material, that material is furnished to the Navy under pledges of confidentiality as an integral part of the Navy's deliberative process in determining whether safety measures must be implemented in response to an accident. *Brockway* v. *Department of Air Force*, 518 F. 2d 1184,

1189-1194 (8th Cir. 1975). Cf. *Mervin* v. *FTC*, 591 F. 2d 821, 825 n.1 (D. C. Cir. 1978); *Deering Milliken, Inc.* v. *Irving*, 548 F. 2d 1131, 1138 n.9 (4th Cir. 1977).

Petitioner contends (Pet. 8-9), however, that the court of appeals' decision in this case holding the entire AAR exempt from disclosure under Exemption 5 creates a conflict among the circuits. The first case relied upon by petitioner, *Machin* v. *Zuckert*, 316 F. 2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), was a pre-FOIA case in which the plaintiff in a lawsuit against an aircraft manufacturer sought to subpoena the AAR prepared in connection with the particular crash. The court held that there is a governmental privilege protecting factual information given in confidence in an accident safety investigation where nondisclosure is necessary to promote the frank and full cooperation of those supplying the information. Petitioner finds *Machin* inconsistent with the decision below because the District of Columbia Circuit limited the privilege in that case to communications made to government personnel by persons outside the government. 316 F. 2d at 340. However, the court "recognize[d] that there may be reasons not presently appearing to us why even [the] portion of the report [involving communications from government personnel] should be immune from subpoena." *Id.* at 340. Thus, *Machin* is not contrary to the decision here, which involved specific consideration of the reasons for extending the rule of nondisclosure to information furnished by government employees and a determination that there is a need for confidentiality in both cases.

The other decision petitioner claims to be in conflict with the decision below, *Brockway* v. *Department of Air Force*, *supra*, was an FOIA case seeking an AAR when no litigation was pending. The court cited *Machin* with approval (518 F. 2d at 1191), but extended its reasoning

in the FOIA context to statements given to an Air Force investigation board under assurances of confidentiality by employees of the government as well as those given by private parties. The Eighth Circuit noted that Exemption 5 permits the withholding of inter-agency and intra-agency memoranda and letters that would not be routinely available to a party in litigation with the agency. 518 F. 2d at 1192 n.7, citing *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. 132, 149 n.16 (1975). Because of the governmental privilege, the court concluded that the AAR would not be routinely available. The court conceded that if the AAR were to be subpoenaed in a specific case, as it was in *Machin*, the particularized need for disclosure of the statements of government employees might be found to outweigh the asserted governmental privilege. But a mere FOIA request, where need is not a relevant consideration (see *EPA* v. *Mink*, 410 U.S. 73, 92 (1973)), was held not to override the privilege. Thus, *Brockway* and the present case, both FOIA actions, are consistent with each other (indeed, the Fifth Circuit cited *Brockway* with approval (Pet. App. A-12 to A-13)), and they do not conflict with *Machin*, which involved a subpoena of the AAR in ongoing litigation.[2]

2. Petitioner contends (Pet. 11-14) that the court of appeals was incorrect in holding that the district court's finding of prior unauthorized release of the AAR was clearly erroneous. Petitioner does not challenge the court of appeals' view that, because all of the evidence before the district court was documentary, "the burden of

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[2]That the D.C. Circuit's decision in *Machin* is fully consistent with *Brockway* is shown by that court's subsequent approving citation of *Brockway*. See *Merrill* v. *Federal Open Market Committee of the Federal Reserve System*, 565 F. 2d 778, 786 (D. C. Cir. 1977), vacated on other grounds, No. 77-1387 (June 28, 1979); *Mervin* v. *FTC*, *supra*, 591 F. 2d at 825 n.1.

establishing clear error is not so heavy [in this case] as in the normal case" (Pet. App. A-32). Rather, petitioner, while conceding that there was no "direct evidence" to support the district court's finding that the AAR had been improperly disseminated, simply maintains (Pet. 13-14) that there was sufficient "circumstantial evidence" to warrant the finding and that, therefore, the court of appeals was bound to accept it. This disagreement with the court of appeals' application of settled principles to the particular facts of this case plainly does not warrant the Court's review.

In any event, the court of appeals' careful review of the evidence on remand demonstrates that its conclusion in this regard is correct. Although the evidence showed that there had been improper dissemination of the fourth endorsement (Pet. App. A-34), the court of appeals found that the fourth endorsement was a separate document which "shorn of formal matter * * * contains less than 400 words" (*id.* at A-33) and that "[n]othing can be told from the endorsement about detailed findings or conclusions of the AAR, assuming there were such" (*id.* at A-33). Three of the four deponents categorically testified that the AAR itself had not been disclosed (*id.* at A-37), and the fourth expressed his general belief that he had never seen it and merely conceded that it was a "possibility" that he had (*id.* at A-34). In these circumstances, the district court's finding that the AAR had been disseminated to unauthorized persons was clearly erroneous.

3. Petitioner attempts to assert as an independent reason for this Court's review the need to correct alleged government "misuse" of AARs (Pet. 9-11). Much of petitioner's argument is based on extra-record allegations of misuse of AARs in other instances, which do not furnish a basis for review here.

However, although the court of appeals concluded that the evidence did not support a finding that the confidentiality of the AAR had been breached in this case, it expressed concern (Pet. App. A-36, A-37 and n.2) about the manner of handling the AAR and suggested that the confidentiality of AARs generally could be jeopardized if their confidentiality were not properly maintained. Following receipt of the court of appeals' opinion, the Department of Justice sent a letter to the General Counsel of the Department of the Navy and the Judge Advocate General of the Navy, with copies to the general counsel of the other military departments and the judge advocates general of the other military services, informing them of the court of appeals' concern and urging them to adopt measures they deemed appropriate to ensure that the integrity and confidentiality of the AARs are preserved in all instances.

In response, we have been informed by the Office of the Judge Advocate General of the Navy that information about the court of appeals' opinion in this case has been disseminated to responsible personnel throughout the Navy, that a training seminar has been held for certain personnel responsible for handling AARs, and that existing Navy instructions are under review to determine whether additional measures are necessary to ensure the confidentiality of the reports in all cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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